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IN THE

COURT OF THE UNITED STATES

OCTOBER TERM 1990

HOWARD DUGGER, et al.

Petitioners,

Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

LEONARD DUGGER, et al.,

Petitioner,

v.

JACK STANLEY TOWNE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the federal courts have jurisdiction under the habeas corpus statute, 28 U.S.C. § 2254(a), to consider a claim by a state prisoner who, while in custody and after equivocally requesting an attorney, is interrogated by the police without counsel and intimidated into making a confession in violation of Miranda and Edwards v. Arizona.

2. Whether the argument that Stone v. Powell should be extended to bar federal habeas corpus review of claims of Miranda violations should be considered on certiorari where the point is raised for the first time in the Court of Appeals and the federal district court judge never had the opportunity to consider it.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iv

STATEMENT OF THE CASE..... 1

A. Statement of the Facts..... 2

B. Opinions Below..... 4

1. The State Trial Court's Order..... 4

2. The State Appellate Court's Decision..... 4

3. The Federal District Court's Order..... 6

4. The Eleventh Circuit's Decision..... 7

REASONS FOR DENYING THE WRIT..... 9

I. THE ELEVENTH CIRCUIT'S DECISION THAT TOWNE'S CONFESSION WAS INADMISSIBLE UNDER THE FIFTH AMENDMENT WHEN IT WAS EXTRACTED AFTER THE POLICE IGNORED AND FAILED TO CLARIFY HIS EQUIVOCAL REQUEST FOR COUNSEL DURING CUSTODIAL INTERROGATION DOES NOT CONFLICT WITH ANY OTHER FEDERAL APPELLATE DECISIONS OR PRESENT ANY IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THE SUPREME COURT..... 10

A. The Eleventh Circuit did not hold Towne's confession was not coerced and was freely and voluntarily given..... 12

B. The fundamental, non-technical violation of Towne's Fifth Amendment rights would require suppression of his confession even under Justice O'Connor's concurrence in Duckworth v. Eagan..... 14

C. Towne was not given a full and fair opportunity to litigate his constitutional claim in the Florida courts..... 16

II. DUGGER'S ARGUMENT THAT THE RULING OF STONE V. POWELL SHOULD BE EXTENDED TO PRECLUDE FEDERAL HABEAS CORPUS REVIEW OF CLAIMS OF MIRANDA VIOLATIONS IS NOT PROPERLY BEFORE THE SUPREME COURT FOR REVIEW..... 18

CONCLUSION..... 20

TABLE OF AUTHORITIES

	PAGE
Agee v. White, 809 F.2d 1487 (11th Cir. 1987).....	18
Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977).....	19
California v. Harris, 468 U.S. 1304, 105 S. Ct. 1, 82 L. Ed. 2d 807 (1984).....	20
Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986).....	16
DeAngelo v. Wainwright, 781 F.2d 1516 (11th Cir.), cert. denied, 479 U.S. 953, 107 S. Ct. 444, 93 L. Ed. 2d 392 (1986).....	11
Duckworth v. Eagan, 492 U.S. ___, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989).....	9,14,16 17,18,19
Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).....	passim
Florida v. Owens, 560 So. 2d 207 (Fla.), cert. denied, 1990 W.L. 116241 (1990).....	11
Fare v. Michael c., 442 U.S. 707, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979).....	15
Jarrell v. Balkcom, 735 F.2d 1242 (11th Cir. 1984), cert. denied, 471 U.S. 1103, 105 S. Ct. 2331, 85 L. Ed. 2d 848 (1985).....	11,19
Long v. State, 517 So. 2d 660 (Fla. 1987), cert. denied, 486 U.S. 1017, 108 S. Ct. 1754, 100 L. Ed. 2d 216 (1988).....	10
Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).....	16
Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	passim
Owen v. Alabama, 849 F.2d 536 (11th Cir. 1988).....	17
Smith v. Illinois, 469 U.S. 91, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984).....	15

Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976)..... passim

Towne v. Dugger, 899 F.2d 1104 (11th Cir. 1990)..... passim

Towne v. State, 495 So. 2d 895 (Fla. Dist. Ct. App. 1986), rev. denied, 504 So. 2d 768 (Fla. 1987)..... 5

Tukes v. Dugger, slip. op. 4786 (11th Cir. Sept. 7, (1990)..... 17

Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977)..... 19

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Dugger's "Statement of the Case" contains critical inaccuracies, omissions, and misstatements going both to this Court's jurisdiction and to the issues that would properly be before this Court if certiorari were granted. For these reasons, the determinative facts and issues, which are stated and readily available in the Court of Appeals' comprehensive eight page published decision, Towne v. Dugger, 899 F.2d 1104 (11th Cir. 1990), are incorporated by reference. Key omissions and misstatements going to this Court's exercise

of its discretion under Rule 10 are corrected here. Rules 15.1, 24.2.

A. Statement of the Facts

Dugger's Petition correctly states that after his arrest and before making any statements, Towne asked Officer Manning if he thought Towne needed an attorney. Pet. at 3. In reciting Manning's testimony at the suppression hearing, however, Dugger's Petition excludes half of the colloquy relied on by the Eleventh Circuit. The full excerpt quoted by the Court of Appeals is as follows:

> Q. [By defense attorney] The subject [of seeing a lawyer] was brought up, wasn't it, before [Towne] made [the taped confession] to you?
>
> A. Yes, sir
>
> Q. Who brought it up?
>
> A. He did.
>
> Q. Okay. How did he bring it up?
>
> A. He asked me if I thought he needed a lawyer.
>
> Q. But he didn't say anything before that like, I think I am in a lot of trouble, I think I need a lawyer, I might need a lawyer, what do you think officer?
>
> A. He basically asked me what -
>
> Q. He just said "officer, what do you think about whether I should get a lawyer?"
>
> A. Something to that effect, yes, sir.

Towne, 899 F.2d at 1107.

Leaping immediately from Manning's testimony to a listing of the types of incriminating evidence Manning told Towne he

possessed, Pet. at 3-4, Dugger's petition completely omits from its Statement of the Case the fact that Manning not only failed to clarify Towne's request for counsel, but he also used the evidence he supposedly possessed to "intimidate[] Towne by making accusatory statements." 899 F.2d 1110-11 (emphasis added). In this regard, the record shows and the Eleventh Circuit found

> No attempt was made by Officer Manning or any other police officer to clarify or discuss in any way Towne's inquiry regarding getting a lawyer. Instead, Officer Manning concedes that he responded to Towne by making accusatory statements regarding the assault, burglary, and sexual battery offenses to which Towne later confessed.

Id. at 1107 (emphasis added).

Dugger's Statement of the Case fails to mention that the accusatory and intimidating statements with which Manning threatened Towne were apparently without factual basis. Manning told Towne that Officer Reddick was pretty sure that Towne was the same person Reddick had chased in a prior crime and that there was a witness who could identify the scar on Towne's hand. Id. Reddick later conceded, however, that he could not positively identify Towne as the person he had chased, R 565-66, and Manning admitted he could not remember the identity of the witness who supposedly could identify the scar on Towne's hand. R 519-21.[1/]

1/ That these accusations were baseless and the prosecution had no evidence against Towne other than his coerced confession is evidenced by the parties' stipulation that the state trial court's ruling on the motion to suppress Towne's confession was dispositive of the charges against him. Towne, 899 F.2d at 1111.

B. Opinions Below

1. The State Trial Court's Order

In addition to overlooking important facts, Dugger's Statement of the Case is also flawed by its inaccurate depiction of the holdings of the state and federal courts below. While Dugger is correct that the state trial court entered an order denying Towne's motion to suppress, Pet. at 4, Dugger does not mention that, as the Eleventh Circuit noted, "the order announced no specific findings of fact." 899 F.2d at 1104. The trial court made a one sentence summary finding that Towne's confession was "freely, knowingly and voluntarily given." Id. It did not mention Towne's question to Manning regarding getting a lawyer, and did not make even one specific finding of fact going to the issue on which this case was decided in the Eleventh Circuit - whether Towne's question was an equivocal request for counsel such that Manning's resumption of uncounselled interrogation without clarifying Towne's request rendered his subsequent confession inadmissible under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) and Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

2. The State Appellate Court's Decision

Towne did not stand trial and was not convicted by a jury after the trial judge denied the motion to suppress. Instead, under the Florida procedure and with the State's agreement, Towne entered pleas of nolo contendere while reserving his

right to appeal the denial of his suppression motion. 899 F. 2d at 1104.

The Florida appellate court affirmed the trial judge. Towne v. State, 495 So. 2d 895 (Fla. Dist. Ct. App. 1986), rev. denied, 504 So. 2d 768 (Fla. 1987). Like the trial judge, the state court of appeals did not specifically address the determinative questions of whether Towne made an equivocal request for counsel and, if so, whether Manning's resumption of interrogation through accusatory statements instead of clarification of the request violated Towne's Fifth Amendment rights under Miranda and Edwards. Instead, the Florida appellate court held only that Towne had not requested a lawyer. Towne v. Dugger, 899 F.2d at 1105; Towne v. State, 495 So. 2d at 899.

Towne also argued in the Florida District Court of Appeal that his confession was involuntary on the ground that the arresting officer promised Towne psychiatric and other help in return for it. On this specific fact question, which is involved neither in the Eleventh Circuit's reversal nor in the instant certiorari proceeding, the Florida appeals court found there was sufficient evidence to support the trial judge's implicit finding that these promises did not improperly induce Towne to confess because they were made after Towne's confession. Towne v. Dugger, 899 F.2d at 1105; Towne v. State, 495 So. 2d at 899.

3. The Federal District Court's Order

Contrary to the impression left by Dugger, Pet. at 5, the federal district court did not state in the context of the equivocal request for counsel issue on which this case turns that Towne's confession was "freely and voluntarily given." To the contrary, the only finding by the district court that Towne acted "freely and voluntarily" was in its discussion of the distinct question of whether the police officer's promises of psychological or other help were made before or after Towne confessed. App. Pet. at A-24. On this particular question, analyzed in part I of the district court's order, the district court agreed with the Florida appellate court. App. Pet. at A-24.

Part III of the order, titled "Self-Incrimination: Denial of Right to Counsel," addressed the equivocal request issue on which the Eleventh Circuit reversed the district court. App. Pet. at A-25. It is true that the district judge held Towne's question to Manning about getting an attorney was not an equivocal request for counsel. Pet. at 5. Contrary to the impression left by Dugger, Pet. at 5, however, the district court did not find Towne acted "freely and voluntarily" in the context of this determinative question. Instead, the district court correctly recognized that had an equivocal request been made, subsequent questioning of Towne would have been impermissible under the holding in Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). App. Pet. at

26.[2/] Acknowledging that the threshold question of whether Towne made an equivocal request for counsel was "of the utmost importance," the district judge held Manning's resumption of questioning through accusatory statements was

> not permissible if Petitioner's question about counsel is an equivocal request for counsel. Thus if Petitioner's question was an equivocal request for counsel, Officer Manning's statements could have caused Petitioner to confess and such a confession would have to be suppressed.

App. Pet. at A-28 (emphasis added).

"[D]ue to the importance of this issue," the district court certified that Towne had probable cause to appeal "whether asking for advice on the need for counsel constitutes an equivocal request for counsel." Towne was granted in forma pauperis status based on the district court's finding that his appeal would be taken in good faith. App. Pet. at A-30, 31.

4. The Eleventh Circuit's Decision

Dugger's assertion that the Eleventh Circuit held Towne's confession was "not coerced and was freely and voluntarily given," Pet. at 5, is a complete misstatement of the Court's holding. In affirming part I of the district court's order, which involved the question of whether Towne was promised psychiatric help before or after he confessed, the Court of Appeals did agree with the district court's conclusion that

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2/ The court's order articulated the well settled rule under Edwards that "once an individual has expressed a desire to consult with an attorney, this request must be honored and the accused may not be subject to further interrogation until he has been provided with counsel or initiates further conversation with the police." App. Pet. at A-26.

Towne was "not coerced" by the police's "promises of psychiatric or other help." Towne v. Dugger, 899 F.2d at 1106. On the other hand, with respect to the part III of the district court's order - the part that is actually in issue here - the Eleventh Circuit reversed the district court's finding that Towne had not equivocally requested counsel without making any statements that under any reading, however strained, could be construed to imply that Towne was not unconstitutionally coerced.

In this regard, the Court of Appeals held that Towne's question was an equivocal request for an attorney which, in violation of Towne's Fifth Amendment rights and Edwards, the police failed to clarify before continuing questioning and eliciting a confession. 899 F.2d at 1106, 1111. In stark and irreconcilable conflict with Dugger's assertion that the circumstances surrounding Towne's confession were non-coercive, free, and voluntary, Pet. at 5, the Eleventh Circuit specifically found that after Towne invoked his right to counsel and before he confessed he was threatened by Manning's "accusatory statements" which "intimidated Towne." Id. at 1107, 1110-11.

Dugger's fallback argument in the Eleventh Circuit, which now forms the basis of the certiorari petition, was that Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), should be extended to preclude federal habeas corpus review of claimed Miranda violations. The Court of Appeals

rejected this contention in a single footnote. The Court held Dugger's failure to present this argument in the district court precluded its consideration on appeal and, in any event, the Court had twice previously rejected the same assertion. 899 F.2d at 1111 n.3. In his petition for rehearing, Dugger advanced the same theory in the Court of Appeals that he advances here as to why his Stone v. Powell argument was timely raised. Pet. at 11 n.3. The petition for rehearing was denied.

REASONS FOR DENYING THE WRIT

With virtually no mention of Rule 10's considerations governing certiorari review, Dugger has repackaged his Stone v. Powell argument to claim for the first time in the more than two year history of this habeas case that the federal courts have all along been without jurisdiction. Under Dugger's theory, the extraction of Towne's uncounselled confession after his invocation of his right to an attorney presents only a "non-constitutional" violation of mere "prophylactic" rules that is not cognizable under the habeas corpus statute.

Dugger's recasting of his backup Eleventh Circuit argument as posing a jurisdictional question cannot withstand scrutiny. Review of the facts and the actual holdings of the lower courts reveals that this case involves a per se violation of rights under the Fifth Amendment that are in no way called into question by Justice O'Connor's concurrence in Duckworth v. Eagan, 492 U.S. ___, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989),

or by Stone v. Powell, or by the reasoning of any of the other authorities cited by Dugger. Further, even if the Supreme Court accepted Dugger's invitation to do what it has previously declined to do and extend Stone v. Powell to claimed Miranda violations, under the specific facts of this case, Towne's confession would still be suppressed because the instant Fifth Amendment violation is fundamental, not technical, and because the state courts did not provide Towne a full and fair opportunity to litigate it.

This Court need not reach any of these questions, however. Dugger's failure to timely present its Stone v. Powell argument in the district court precluded its consideration by the Court of Appeals. The Supreme Court should not grant certiorari to consider it now.

I. THE ELEVENTH CIRCUIT'S DECISION THAT TOWNE'S CONFESSION WAS INADMISSIBLE UNDER THE FIFTH AMENDMENT WHEN IT WAS EXTRACTED AFTER THE POLICE IGNORED AND FAILED TO CLARIFY HIS EQUIVOCAL REQUEST FOR COUNSEL DURING CUSTODIAL INTERROGATION DOES NOT CONFLICT WITH ANY OTHER FEDERAL APPELLATE DECISIONS OR PRESENT ANY IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THE SUPREME COURT.

Even before the merits of this specific case are taken into account, Dugger's request for review on certiorari is faced with two formidable obstacles. First, the Supreme Court has previously denied the State of Florida's certiorari petition in a case granting relief to a defendant based on the same equivocal request for counsel issue that caused the Eleventh Circuit to reverse here. Long v. State, 517 So. 2d 660 (Fla. 1987), cert. denied, 486 U.S. 1017, 108 S. Ct. 1754,

100 L. Ed. 2d 216 (1988). It is not surprising, then, that Dugger does not urge this Court to grant certiorari to consider the equivocal request rule.[3/] Second, in two cases arising out of the Eleventh Circuit, the Supreme Court has in recent years denied certiorari where the Court of Appeals rejected the same argument Dugger makes here, that the ruling of Stone v. Powell should be extended to preclude federal habeas corpus review of Miranda violations. DeAngelo v. Wainwright, 781 F.2d 1516 (11th Cir.), cert. denied, 479 U.S. 953, 107 S. Ct. 444, 93 L. Ed. 2d 392 (1986); Jarrell v. Balkcom, 735 F.2d 1242 (11th Cir. 1984), cert. denied, 471 U.S. 1103, 105 S. Ct. 2331, 85 L. Ed. 2d 848 (1985) (extension of Stone beyond its Fourth Amendment roots would be a major departure from established case law).

Dugger's present attempt to resurrect indirectly these issues under a "jurisdictional" label does not conceal the fact that the Supreme Court has previously declined to grant certiorari to review them in the past. When this background is considered in tandem with the specific facts and lower court holdings in this case, it becomes even more clear that there is

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3/ Relatedly, the Supreme Court also very recently denied the State of Florida's petition for certiorari in a case in which the defendant's conviction was reversed where his equivocal invocation of his right to terminate questioning was not clarified before interrogation continued. Florida v. Owen, 560 So. 2d 207 (Fla.), cert. denied, 1990 W.L. 116241 (1990).

no reason for this Court to grant certiorari to consider them now.

A. The Eleventh Circuit did not hold Towne's confession was not coerced and was freely and voluntarily given.

As the Statement of the Case shows, Dugger's contention that this case presents only a technical, non-constitutional violation of Miranda and Edwards rests entirely on his unfounded claim that the record shows and the Eleventh Circuit held Towne's confession was freely and voluntarily given. Pet. at 5-12. Dugger constructed his voluntariness premise by wrenching from context a passing statement from the one paragraph of the Eleventh Circuit's decision that is unrelated to the questions presented here, the paragraph upholding the district court's finding that the police officers' promises of psychiatric help followed rather than preceded Towne's confession. Towne v. Dugger, 899 F.2d at 1106. As all of Dugger's legal arguments concerning so-called mere "non-constitutional" violations of Miranda's "prophylactic" rules are completely dependent on this out of context and erroneous characterization of the Court of Appeals' actual holding, they all collapse immediately when the misstatement is exposed.

Simply put, there is no support for Dugger's bald assertion that the Eleventh Circuit held "Towne's confession was not coerced, and was freely and voluntarily given." Pet. at 5. In the context of the Fifth Amendment violation that compelled reversal in this case, the Court of Appeals

specifically found that instead of clarifying Towne's request for counsel, Office Manning concededly "intimidated Towne by making accusatory statements." Towne v. Dugger, 899 F.2d at 1107, 1110-11 (emphasis added). Even the district court judge, who erroneously denied habeas relief on the ground that Towne had not invoked his right to counsel, found that "if [Towne]'s question was an equivocal request for counsel, Officer Manning's statements could have caused [Towne] to confess and such a confession would have to be suppressed." App. Pet. at A-28 (emphasis added).

Dugger cannot succeed in making it appear that a statement by the Court of Appeals on a separate set of facts going to an immaterial issue[4/] has relevance to the distinct Fifth Amendment issue that prompted the Eleventh Circuit to reverse. The determinative facts are undisputed. Towne's confession was extracted after the police intimidated him with unfounded accusations rather than clarify his equivocal request, in violation of the Fifth Amendment and the cases construing it. Those cases are not challenged here.

All of Dugger's legal arguments on jurisdiction and Stone v. Powell are fatally flawed because they hinge on the

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4/ Indeed, even as to this immaterial side issue, Dugger badly overstates the case. The Court of Appeals held only that Towne's confession was "not coerced by promises of psychiatric or other help," 899 F.2d at 1106 (emphasis added), not that his "confession was not coerced and was freely and voluntarily given." Pet. at 5 (emphasis added).

unsupportable premise that Towne's confession was free and voluntary. For this reason alone, certiorari should be denied.

B. The fundamental, non-technical violation of Towne's Fifth Amendment rights would require suppression of his confession even under Justice O'Connor's concurrence in Duckworth v. Eagan.

Even if the concurrence in Duckworth v. Eagan, 492 U.S. _ _, 109 S. Ct. 2895, 106 L. Ed. 2d 166 (1989), on which Dugger relies could be deemed a "decision" of the Supreme Court within the meaning of Rule 10, certiorari still should not be granted because the Eleventh Circuit's opinion does not conflict with it. Duckworth involved a claimed Miranda violation based on the alleged inadequacy of the phrasing of a printed warning on a police form. As Justice O'Connor's concurrence stated, the habeas corpus claim in Duckworth involved whether "Miranda warnings were not given or were somehow deficient." 109 S. Ct. at 2883 (O'Connor, J., concurring) (emphasis added). This Court held the warnings in Duckworth sufficiently conveyed to the suspect his rights as required by Miranda. Id. at 2880-81.

In sharp contrast, the instant case does not involve the contention that the Miranda warnings given to the accused did not adequately advise him of his rights because of some deficiency in wording. Towne has not contended and does not now contend that, as in Duckworth, there was a technical defect in the manner in which the Miranda warnings were issued. Instead, Towne contends and the Court of Appeals reversed for a different and fundamental reason that goes to the very heart of

the core Fifth Amendment values protected by Miranda, Edwards, and their progeny. The Eleventh Circuit reversed because the police did not respect Towne's invocation of his right to counsel and, by continuing to interrogate, accuse, and intimidate him until he gave an uncounselled confession, they violated Towne's Fifth Amendment guarantee against self-incrimination. Towne, 899 F.2d at 1106-11

The violation of a suspect's right to have an attorney present during custodial interrogation directly implicates the Fifth Amendment itself. Fare v. Michael C., 442 U.S. 707, 719, 99 S. Ct. 2560, 2569, 61 L. Ed. 2d 197 (1979) ("an accused's request for an attorney is per se an invocation of his Fifth Amendment rights requiring that all interrogation cease"); Edwards v. Arizona, 451 U.S. at 485-86, 101 S. Ct. at 1885 (Fifth Amendment right to have counsel present at any custodial interrogation). Such a violation does not, as Dugger claims, involve only Miranda's "prophylactic" aspect or mere "non-constitutional" concerns. There is nothing in any of Dugger's cases to suggest that a Fifth Amendment violation of this fundamental character is not properly reviewed under the federal habeas corpus statute.

Indeed, so critical is this aspect of the Fifth Amendment's protection that an accused's post-request responses to further interrogation may not be used to cast doubt on the clarity of his initial request for counsel. Smith v. Illinois, 469 U.S. 91, 98, 105 S. Ct. 490, 495, 83 L. Ed. 2d 488

(1984).[5/] Significantly, even the concurring opinion on which Dugger relies acknowledges that where, as here, one is compelled to confess by governmental coercion, "the suppression remedy is quite possibly contained within the guarantee of the Fifth Amendment itself." Duckworth, 109 S. Ct. at 2883 (O'Connor, J., concurring) (citing Colorado v. Connelly, 479 U.S. 157, 163-64 & n.1, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986) and Malloy v. Hogan, 378 U.S. 1, 6-8, 84 S. Ct. 1489, 1492-94, 12 L. Ed. 2d 653 (1964)). Even under Justice O'Connor's Duckworth concurrence, the refusal of the police to respect Towne's invocation of his right to counsel is a per se violation of Towne's Fifth Amendment rights which requires suppression.

C. Towne was not given a full and fair opportunity to litigate his constitutional claim in the Florida courts.

Even if this Court decided to rule with Dugger and extend Stone v. Powell to preclude federal habeas corpus review of claims of Miranda violations, there is another reason why the result in the instant case would be unchanged. Towne is

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5/ Ignoring this rule, Dugger again insists here as he unsuccessfully urged below that Towne "expressed his desire to waive his rights." Pet. at 8. The threshold inquiry with regard to waiver of the right to counsel is whether the right to counsel was in fact invoked. Towne v. Dugger, 899 F.2d at 1007. As the interrogating officer in this case failed to clarify Towne's request, the waiver question does not even come into play. That the police repeatedly administered the Miranda warnings after Dugger's equivocal invocation of his right to counsel was made and ignored is irrelevant, for a valid waiver of the right to counsel cannot be established by showing that the suspect responded to further police-initiated questioning. Edwards, 451 U.S. at 484, 101 S. Ct. at 1884.

entitled to have the federal courts consider the violation of his Fifth Amendment rights on habeas corpus because he was not afforded a full and fair opportunity to litigate his claim in the Florida state courts.

In this regard, under the extension of Stone v. Powell Dugger urges, federal habeas corpus review of a state prisoner's claim of a Miranda violation would be precluded only if a full and fair opportunity to litigate the claim had been made available in the state courts. Duckworth, 109 S. Ct. at 2882 (O'Connor, J., concurring). In the instant case, the state trial judge made only a one sentence conclusory finding and did not explicitly address any facts or even mention the equivocal request here. Likewise, the state appellate court that affirmed did not identify or analyze the Fifth Amendment equivocal request for counsel issue on which the Eleventh Circuit reversed.[6/] In the absence of explicit findings or full consideration by the state courts of the constitutional claim on which the Eleventh Circuit reversed, Towne's constitutional claim was not fully and fairly considered by the state courts. Tukes v. Dugger, No. 88-5685, slip. op. at 4786, 4792-93 (11th Cir. Sept. 7, 1990) (no full and fair consideration where the state trial court made no explicit factual findings on the critical question as to whether the

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6/ Instead, both state courts erroneously treated the issue as a waiver of counsel question and employed a "totality of the circumstances" test. That test is inapplicable to the equivocal request issue the federal courts addressed. Owen v. Alabama, 849 F.2d 536, 539 (11th Cir. 1988).

accused made a request for counsel that should have been honored by the interrogating officer, and the state appellate court did not explicitly address the question at all); Agee v. White, 809 F.2d 1487 (11th Cir. 1987) (no full and fair consideration where the state appellate court did not specifically address constitutional claim). Because the critical facts and issues were not explicitly considered by the state courts, even under the extension of Stone Dugger proposes, Towne's habeas corpus petition was properly heard by the federal trial and appellate courts.

II. DUGGER'S ARGUMENT THAT THE RULING OF STONE V. POWELL SHOULD BE EXTENDED TO PRECLUDE FEDERAL HABEAS CORPUS REVIEW OF CLAIMS OF MIRANDA VIOLATIONS IS NOT PROPERLY BEFORE THE SUPREME COURT FOR REVIEW.

Because the argument was not presented to the district court, the Eleventh Circuit held Dugger's contention that Stone should be extended to preclude federal habeas review of claimed Miranda violations was not properly before it on appeal. Towne v. Dugger, 899 F.2d at 1111 n.3. Dugger now argues the Court of Appeals erred in refusing to entertain his Stone contention because Duckworth was not issued until after the entry of the district court's order, so that Dugger did not have the opportunity to raise the point until after the case was already on appeal. Pet. at 11 n.3. This identical argument was made by Dugger in his petition for rehearing to the Eleventh Circuit. The Court of Appeals implicitly rejected it when it denied Dugger's petition.

Dugger's argument for extending Stone v. Powell necessarily has its genesis in Stone itself, which was decided in 1976, twelve years before Towne filed his pro se petition for a writ of habeas corpus. As Dugger's own petition shows, Pet. at 11 n.3, the claim that Stone should be extended to Miranda claims is neither new nor novel. The issue has been discussed for many years. It was identified in two 1977 decisions of this Court, Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977) and Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977), which both predate Towne's petition by nine years. Further, two years before Towne filed his habeas petition, in Jarrell v. Balkcom, 735 F.2d 1242 (11th Cir. 1984), cert. denied, 471 U.S. 1103, 105 S. Ct. 2331, 85 L. Ed. 2d 848 (1985), the Eleventh Circuit rejected the exact same extension of Stone Dugger now advances.

In short, Stone v. Powell and cases addressing the question of its extension to bar federal habeas review of Miranda violations were decided years before the federal district judge in this case issued his order denying relief. Justice O'Connor's Duckworth concurrence does not identify a new argument previously unavailable to Dugger. Nor does it constitute a "decision" previously unavailable to Dugger on which a claim of a Rule 10 conflict can be based.

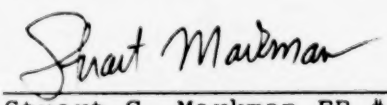
Because the argument was available but not made by Dugger in the district court, Dugger's belated attempt to extend the

rule of Stone v. Powell should be rejected as untimely. Where such procedural snarls exist due to the state's failure adequately to preserve the question presented, the Supreme Court is deterred from granting certiorari. California v. Harris, 468 U.S. 1304, 105 S. Ct. 1, 82 L. Ed. 2d 807 (1984).

CONCLUSION

This case presents neither a conflict with other federal decisions nor an unsettled and important question of federal law. Dugger's petition for Writ of Certiorari should be denied.

Respectfully submitted,



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